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No. \_\_\_\_\_

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ALEXANDER L. STEVAS,  
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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

JOAN B. REDHEAD, individually and as co-executrix of the  
Estate of Hugh McCulloch Redhead, deceased, and the  
NATIONAL BANK OF DETROIT, co-executor of the Estate  
of Hugh McCulloch Redhead, deceased,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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December 1, 1982

## QUESTION PRESENTED

Whether, under federal law, a Federal Aviation Administration air traffic controller has an independent duty to safeguard the lives of passengers under his control when he knows or should know that the plane is descending in poor visibility close to mountainous terrain—or whether he may simply assume that the pilot is operating in safe conditions and therefore do nothing.<sup>1</sup>

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<sup>1</sup> The parties below were:

Joan B. Redhead, individually and as co-executrix of the Estate of Hugh McCulloch Redhead, deceased, and the National Bank of Detroit, co-executor of the Estate of Hugh McCulloch Redhead, deceased—plaintiffs and appellants.

United States of America—defendant and appellee.

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**OPINIONS BELOW**

The majority and dissenting opinions of the court of  
appeals are reported at 686 F.2d 178 and appear in the  
appendix at 1a. The opinion of the district court is un-  
reported and appears in the appendix at 24a.

**THE COURT'S JURISDICTION**

The judgment of the court of appeals was entered on  
August 6, 1982. A timely petition for rehearing and sug-  
gestion for rehearing en banc was denied on September 2,  
1982.

## STATUTES AND REGULATIONS

This Court has jurisdiction to review the court of appeals' judgment pursuant to 28 U.S.C. § 1254(1), 28 U.S.C. § 2101(c) and Rule 20.4 of the Rules of the Supreme Court.

The text of the following relevant statutes and regulations are set forth in the appendix:

Federal Aviation Act of 1958 § 307, Pub. L. 85-726, 72 Stat. 749, 49 U.S.C. § 1348;

Federal Aviation Act of 1958 § 601, Pub. L. 85-726, 72 Stat. 775, 49 U.S.C. § 1421;

Federal Aviation Administration, En Route Air Traffic Control Manual (as revised September 12, 1975).

## STATEMENT OF THE CASE

This action was brought by the widow and executors of the estate of Hugh McCulloch Redhead to recover damages under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* The action seeks to recover for the negligence of the Federal Aviation Administration that led to the crash of the airplane in which Mr. Redhead was a passenger on September 12, 1975. At the time of the crash into a cloud-covered ridge, the plane was under the control of an FAA air traffic radar controller.<sup>2</sup>

Most of the facts were stipulated to and are essentially undisputed. On September 12, 1975, Mr. Redhead was a passenger aboard a private corporate aircraft ("Charlie Echo") flying to Nemacolin, Pennsylvania. During an intermediate stop at Pittsburgh, the pilot was told by the FAA's air traffic control weather briefer that there were

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<sup>2</sup> A timely administrative claim was filed on August 19, 1977 with the FAA. After that claim was denied on January 26, 1978, a timely complaint was filed in the United States District Court for the Western District of Pennsylvania. 28 U.S.C. §§ 1332(a), 1346(b), 2401(b), 2671 *et seq.*



low ceilings and poor visibilities existing in the Nemacolin vicinity and that the weather was expected to remain "down." The forecast for the area called for a solid deck of clouds from about 1500 feet Mean Sea Level ("MSL") to 15,000 or 16,000 feet MSL.

Because of these weather conditions, the crew filed a flight plan calling for the plane to fly under FAA Instrument Flight Rules ("IFR") to Nemacolin, which is at an elevation of 2,000 feet MSL.<sup>3</sup>

Shortly after take-off, the crew received a cruise clearance of 5,000 feet MSL to fly, first, to the Indianhead VORTAC radio navigation facility (about twenty nautical miles northeast of Nemacolin Airport) and, then, to Nemacolin. Under FAA regulations, the plane could not descend below this 5,000 foot MSL altitude unless VFR conditions were present.<sup>4</sup>

During the entire course of the flight, the plane was under the control of the FAA air traffic controller. The controller's radar screen was updated every ten seconds to display the plane's assigned altitude, its actual altitude and its precise location. From the radar screen, the controller was therefore aware that the plane was descending below its assigned 5,000-foot minimum altitude in an

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<sup>3</sup> A flight may be conducted under one of two different sets of FAA flight rules—Visual Flight Rules (VFR), or Instrument Flight Rules (IFR). FAA regulations permit VFR flight in controlled airspace, the area (above 1200 feet) in which Charlie Echo was operating, only if a pilot has forward visibility of at least three miles and can fly at least 500 feet below, 1,000 feet above, and 2,000 feet laterally from any clouds. 14 C.F.R. § 91.105 (1981). As the majority of the court of appeals noted (686 F.2d at 180 n.1, App. 3a), unless these conditions prevail, the aircraft must be operated pursuant to FAA Instrument Flight Rules, where it is presumed that pilots are unable to see either other aircraft or the ground and therefore are guided by air traffic controllers.

<sup>4</sup> The Minimum En Route Altitude and the Minimum Obstruction Clearance Altitude for the Nemacolin area are both 5000 feet.



FAA-designated "mountainous area," which the controller knew contained ground obstructions at an elevation of 2,900 feet MSL.

All contemporary weather reports indicated that Visual Flight Rules—conditions did not exist and were not forecast for the area. This fact was specifically confirmed by the pilot of an Army helicopter only three miles away from where Charlie Echo was flying (the minimum distance for VFR horizontal flight visibility), who stated that he could not see Charlie Echo because of the prevailing *IFR* weather conditions. (686 F.2d at 186-87 nn. 6, 7, App. 16a-17a nn. 6, 7).

All indications were that VFR conditions did not exist in the area. Despite the controller's knowledge that pilots occasionally violate VFR minimums, the controller simply assumed that the plane was in VFR conditions based solely on his assumption that the pilot would not have descended below 5,000 feet unless VFR conditions existed. (686 F.2d at 187, App. 18a.)

Because of "recent [radar] controlled flights into the ground"—crashes of airplanes that are under the control of an FAA radar controller—on June 12, 1975, barely three months before Charlie Echo was to crash near Nemaquin, the Director of the FAA issued an explicit order on this subject. That order notified air traffic controllers that they had a "first priority duty," along with the separation of aircraft, to immediately issue a "Low Altitude Alert" to "radar identified aircraft if an automatic altitude report [appearing in the "data block" on the radar screen] is observed on radar showing the aircraft to be at an altitude, which in the controller's judgment places the aircraft in unsafe proximity to terrain/obstructions." (FAA En Route Air Traffic Control Manual ("FAA Manual") ¶ 55A (1975)).

A "first priority duty" is one taking precedence over any other duties a controller may have. And in the case

of a "Low Altitude Alert," such a warning is "more explicit and more definitive than just a mere judgment call," since its purpose is to advise the crew of an aircraft that, for whatever reason, the controllers, have observed that airplane to be in a dangerous situation and it should climb immediately.

As the plane in which Mr. Redhead was a passenger was flying toward Nemacolin just before noon on September 12, 1975, the radar controller's screen showed the plane descending below the minimum 5,000 foot IFR cruise clearance altitude (which was also the Minimum En Route Altitude and the Minimum Obstruction Clearance Altitude). The radar controller was aware that there were ground obstructions in the area at elevations of 2,900 feet MSL.

At 1555:29 GMT (11:55:29 local time)—less than two minutes after the radar controller told the helicopter that Charlie Echo had descended below the minimum 5,000 foot altitude to 4,100 feet and the helicopter reported he could not see the plane—the controller asked:

847CE what are your intentions?<sup>a</sup>

The plane was still descending. The radar controller asked this question because he wanted to find out whether Charlie Echo wished to cancel its cruise clearance—which could only be done if the plane was actually in VFR conditions—"and a concern about how he was going to do it," i.e., "whether or not he was flying in VFR." The radar controller's concern was understandable in view of his knowledge that the weather at all of the closest reporting stations was IFR (even if he did not understand what the helicopter pilot had told him two minutes earlier about it).

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<sup>a</sup> This inquiry indicated that the radar controller was still providing radar services, i.e., he was still in radar control of the plane.

After hesitating for twelve seconds, at 1555:41 GMT the plane replied:

We just take a look we're gettin' some ground contact here and I think we're gonna make it but ah just stand by with us and we'll give ya a call here in a minute.

The automatic altitude readout on the "data block" on the controller's radar screen indicated that Charlie Echo was descending through an altitude of 3,400 and down to about 3,100 feet—a bare 200 feet above the 2,900-foot ground obstructions in the area. Despite his earlier concern and his knowledge about the terrain and the weather in the area, the radar controller simply assumed that the plane was in VFR conditions on the theory that otherwise it would not have descended to this altitude.

The controller did nothing. The plane's descent continued to be depicted on the controller's screen and "data block" readout for approximately three more minutes until radar contact was lost at an altitude of roughly 2,800 feet.

The plane was found a day later. It had crashed into trees and then into the ground at an elevation of approximately 2,700 feet MSL. All of the occupants, including Mr. Redhead, were killed in the crash.<sup>6</sup>

The FAA's En Route Air Traffic Control Manual states in no uncertain terms that an air traffic controller is required to

[b]ecome familiar with pertinent weather information when coming on duty and stay aware of current weather information needed to perform air traffic control duties.

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<sup>6</sup> Toxicological tests and post mortem examination of the two pilots disclosed nothing that could have contributed to the cause of the accident. A post-accident examination of the plane's engines also revealed no pre-impact malfunction of mechanical failure.

FAA Manual ¶ 78. To accomplish this, a controller is also required to

[s]olicit PIREP weather reports from pilots when one or more of the following conditions exist or are forecast for the area:

(1) Ceilings at or below 500 feet.

(2) Visibility (surface or aloft) at or less than 5 miles.

. . . .

FAA Manual ¶ 81.

Both of these two weather conditions were present in the area where Charlie Echo was flying on September 12, 1975.

A radar controller is also required by the En Route Air Traffic Control Manual to give a "first duty priority" to protecting aircraft from being "in unsafe proximity to terrain/obstructions." The Manual's provisions are quite explicit; a radar controller is required to,

[i]mmediately issue a low altitude alert to a radar identified aircraft if you observe an automatic altitude report on radar showing the aircraft to be at an altitude, which in your judgment, places the aircraft in unsafe proximity to terrain/obstructions.

*Phraseology:*

(Ident) LOW ALTITUDE ALERT, ADVISE YOU CLIMB IMMEDIATELY.

FAA Manual ¶ 55A.

The district court ruled that the controller "was entitled to assume that the pilot was in command of the situation and was operating the aircraft in accordance with [FAA] regulations." 686 F.2d at 180, App. 2a.

On appeal, over a vigorous dissenting opinion, a two-judge majority of the court of appeals affirmed. The dissent stated that

the district court's failure to apply, or even to recognize, the principle of concurrent duties of care led to clearly erroneous findings of fact. I would reverse on the ground that the controller had a duty to issue a low altitude alert to the plane which he did not discharge.

686 F.2d at 184, App. 11a. And further:

the controller was negligent because he failed to discharge his duty to issue a low altitude alert to the plane as it descended. The controller had a duty to warn, established by the *Controller's Manual*, because under the circumstances he was not entitled to assume that the plane's pilot was obeying the visual flight rules.

686 F.2d at 189, App. 22a.

#### REASONS FOR GRANTING THE WRIT

**THE COURT OF APPEALS' DECISION IS CONTRARY TO THE DECISIONS OF OTHER COURTS OF APPEALS HOLDING THAT AIR TRAFFIC CONTROLLERS HAVE AN INDEPENDENT DUTY TO SAFEGUARD THE LIVES OF AIRPLANE PASSENGERS**

This Court has never passed upon the duty owed airplane passengers by the Federal Aviation Administration's air traffic controllers.

Every recent court of appeals decision—apart from the decision below—has held in no uncertain terms, however, that FAA air traffic controllers have a duty that is *independent of and concurrent with* the responsibility of pilots to see that the lives of aviation passengers are not endangered. See, e.g., *Rudelson v. United States*, 602 F.2d 1326 (9th Cir. 1979); *Mattschei v. United States*, 600 F.2d 205, 208 (9th Cir. 1979); *Todd v. United States*, 384 F. Supp. 1284 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977) (per curiam); *In re Air Crash Disaster v. United States*, 544 F.2d 270 (6th Cir. 1976); *Freeman*



*v. United States*, 509 F.2d 626 (6th Cir. 1975); *Ingham v. Eastern Air Lines*, 373 F.2d 227 (2d Cir.), *cert. denied sub nom. United States v. Ingham*, 389 U.S. 931 (1967); *Stork v. United States*, 430 F.2d 1104 (9th Cir. 1970); *see also Himmler v. United States*, 474 F. Supp. 914, 942-43 (E.D. Pa. 1979).<sup>7</sup>

That the other circuits have reached a conclusion at odds with the panel majority—but in agreement with the dissent—here is itself a sufficient reason for granting the writ.

**AN AIR TRAFFIC CONTROLLER'S DUTY TO SAFEGUARD THE LIVES OF PASSENGERS IS A MATTER OF OVERRIDING FEDERAL IMPORTANCE THAT THIS COURT HAS NOT ADDRESSED**

Under the Federal Tort Claims Act, the liability of the United States is to be determined "in accordance with the law of the place where the act or omission occurred," 28 U.S.C. § 1346(b). Where the acts or omissions of the Federal Aviation Administration or its employees are in issue, however, it is essentially federal law that will govern—since, as often as not, it is the FAA's own regulations that establish the minimum duty of care.

By the same token, the federal courts have exclusive jurisdiction to decide cases involving the FAA's failure to protect the lives of air travelers. 28 U.S.C. § 1346(b). As a result, virtually every case involving the FAA's duty of care has arisen—and will continue to arise—in the federal courts. This is, of itself, a compelling reason for this Court to consider and determine the applicable federal standard governing the FAA's statutory duty to insure the safety of aircraft and air passengers.

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<sup>7</sup> As the Court stated in *United States v. Singer Manufacturing Co.*, 374 U.S. 174, 194 n.9 (1963),

[i]nsofar as [a district court's] conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law.

Each year, there are approximately 4,000 airplane accidents in the United States. Since 1975, more than 10,000 people have died, and more than 10,000 more have been injured in aviation accidents.\*

Section 307(c) of the Federal Aviation Act of 1958 states in no uncertain terms that the Administrator of the FAA is "directed to prescribe air traffic rules and regulations . . . for the . . . protection . . . of aircraft."\* Section 601 of that Act provides in equally unequivocal terms that "[t]he Administrator is empowered and it shall be his duty to promote safety of civil aircraft in air commerce . . . ." <sup>10</sup>

As the dissent below emphasized,

[t]he negligence of a pilot is not imputed to his or her passengers. *Pierce v. United States*, [679 F.2d 617 (6th Cir. 1982)] *supra*, at 622. The controller's duty is to convey all information and give all warnings specified by Federal Aviation Administration manuals, and to 'take steps beyond those set forth in the manuals if such steps are necessary to ensure the safety of pilots and passengers' in emergency or especially hazardous situations. *Rudelson v. United States*, *supra*, 602 F.2d at 1329. *Accord*, *Hartz v. United States*, 387 F.2d 870, 873-74 (5th Cir. 1968); *Himmler v. United States*, 474 F. Supp. 914, 931 (E.D. Pa. 1979). A controller may have a duty to act even if the emergency arises from a pilot's failure to comply with FAA regulations.

686 F.2d at 185, App. 12a; *see also Himmler v. United States*, 474 F. Supp. 914 at 930 (E.D. Pa. 1979):

While it is certainly true that a pilot is in control of his airplane [citations omitted], and the con-

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\* U.S. Bureau of the Census, Statistical Abstract of the United States: 1981, Table 1065 at 614 (1981).

\* Pub. L. 85-726, 72 Stat. 749, 49 U.S.C. § 1348(c).

<sup>10</sup> Pub. L. 85-726, 72 Stat. 775, 49 U.S.C. § 1421(a) (6).



troller can't fly it for him, it does not mean that a controller cannot also be negligent in his handling of the pilot and the situation at hand. The standard of care in aviation cases has been held to be concurrent, and responsibility rests upon both the pilot and [the controller].

In addition to the requirements of any applicable federal regulations,

[t]he air traffic controller is required to give all information and warnings specified in his manuals, and in certain situations he must give warnings beyond the manuals. This duty to warn is based on the simple tort principle that once the Government has assumed a function or service, it is liable for negligent performance.

*Spaulding v. United States*, 455 F.2d 222, 226 (9th Cir. 1972).

These principles take on added force where an airplane is flying in Instrument Flight Rules ("IFR") weather conditions, since the plane and its passengers are truly under the "control" of the FAA's radar controller. *Yates v. United States*, 497 F.2d 878, 883 (10th Cir. 1974) ("For all practical purposes, he was in [the] complete control of the tower.").

In a similar case (also involving an IFR cruise clearance, questionable weather and a crash into a mountain ridge), the federal courts had no difficulty in concluding that the air controller had been negligent:

[I]t should have been reasonably apparent to the ATC [air traffic controller] that the Cheaha Mountain, the highest terrain in the entire area and obscured by weather, was in the vicinity of 8124Y, and that the pilot could not safely descend at his discretion. Though the presence of the terrain and the potential danger it presented should have been equally obvious to Todd [the pilot] in the exercise of due care, ATC nevertheless had a duty to warn

Todd . . . that he was in the vicinity of Cheaha Mountain and a descent might prove dangerous. Failure to issue this warning constituted negligence on the part of the United States.

*Todd v. United States*, 384 F. Supp. 1284, 1292 (M.D. Fla. 1975), *aff'd*, 553 F.2d 384 (5th Cir. 1977) (per curiam).

Here, not only did all of the reported weather information indicate that IFR, rather than VFR, weather conditions were present in the area of Charlie Echo's flight, but the pilot of the Army helicopter told the radar controller the same thing at the same time the controller knew that Charlie Echo, just three miles away, was already at 4,100 feet, well below the minimum IFR altitude of 5,000 feet.

As the court noted in *Stork v. United States*, 430 F.2d 1104, 1108 (9th Cir. 1970), "[a]ny assumptions on which deference to the judgment of the pilot can normally rest were refuted by the events themselves." *See also Furumizo v. United States*, 245 F. Supp. 981, 992 (D. Haw. 1965) (even where prior warning had been given and regardless of what the controller "thought well-trained pilots generally ought to know," the controller still had a duty to warn of an extremely hazardous act).

In sum, whether or not the pilots of the aircraft were negligent—the unstated but basic rationale for the two-to-one court of appeals decision—is irrelevant to the fundamental issue here: was the FAA radar controller negligent in failing to verify with Charlie Echo if the plane was in VFR conditions and failing to give the required Low Altitude Alert directing the plane to climb immediately? *Rudelson, supra*, 602 F.2d at 1330.

As a matter of overriding federal law the answer to this question should be "yes." Airplane passengers are entitled to place a "heavy degree of reliance . . . upon the government for insuring the safety of their flights"

in view of the "high stakes involved." *Himmler, supra*, 474 F. Supp. at 942, quoting from *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 235-36 (2d Cir. 1967). Because of these dangers,

. . . [w]hat might be held to meet the standard of ordinary care in some different situations does not necessarily measure up to ordinary care in an air traffic control room where . . . there is always the possibility that tragic accidents may occur in a matter of seconds if controllers who assume a high responsibility, relax from constantly overseeing an aircraft to promote its safety in flight.

*Hennesey v. United States*, 12 CCH Aviation Law Reports 17,410, 17,418 (N.D. Cal. 1971).

The provisions in the FAA's En Route Air Traffic Control Manual plainly specify that the radar controller here had a duty to inquire of Charlie Echo as to the weather it was encountering—and then to give a Low Altitude Alert to climb immediately once the controller ascertained that the plane was not in VFR conditions. The evidence is uncontradicted that the radar controller responsible for insuring the safety of Charlie Echo's passengers, including Mr. Redhead, did nothing.

Even apart from the conflict between the two-to-one opinion below and the decisions of other courts of appeals, this case squarely presents a matter of federal law having the utmost importance to the lives and safety of the hundreds of thousands of airplane passengers each year who are under the direct control of the FAA and its air traffic controllers. As Judge Becke underscored in his dissent:

My concerns about the majority's disposition of this case transcend my belief that this case is wrongly decided. The standards of conduct for air traffic controllers are high because the safety of air travelers demands it. . . . Because the Government, through air traffic control, has undertaken to pro-

mote safe air travel, pilots and especially passengers are entitled to rely on controllers' full performance of their exacting duties. . . . That assistance was not given to the pilot here, and the result was tragic for the completely innocent passengers as well as for the apparently negligent pilot.

686 F.2d at 189, App. 22a-23a.

### CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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